1976

Norman K. Cluff, Jessica H. Cluff v. Elmer Culmer and Elsie Culmer : Brief of Respondent

Utah Supreme Court

Orrin G. Hatch; Hatch and Plumb; Attorney for Appellants.
Richard M. Taylor; Attorney for Respondents.

IN THE SUPREME COURT

OF THE STATE OF UTAH

NORMAN K. CLUFF and JESSICA H. CLUFF, Plaintiffs-Appellants, v. ELMER CULMER and ESSIE CULMER, Defendants-Respondents.	:	CASE NO. 14525

RESPONDENT'S BRIEF

Appeal from Judgment of the Fourth Judicial District Court, Utah County, State of Utah. The Honorable J. Robert Bullock, Judge.

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IN THE SUPREME COURT

OF THE STATE OF UTAH

NORMAN K. CLUFF and JESSICA H. CLUFF,	:	
Plaintiffs and Appellants,	:	
v.	:	CASE NO. 14525
ELMER CULMER and ESSIE CULMER,	:	
Defendants and Respondents.	:	

BRIEF OF DEFENDANTS-RESPONDENTS

. . . .

STATEMENT OF THE CASE

The Plaintiffs and Appellants, Cluffs, ask to reverse the Trial Court's taxation of costs assessed at $85.70 and award costs of $4,359.65 or, in the alternative, to remand the case to District Court for reconsideration of Cluff's Memorandum of Costs and Disbursements.

DISPOSITION IN LOWER COURT

The Jury in a special verdict found the Defendants and Respondents, Culmers, liable to Cluffs for $600.00 in damages to pay for the cost of placing the subject property in the condition it was in when purchased by Cluffs on March 14, 1973. Culmers occupied the property as tenants from March 14, 1973 to mid-1974. Costs were taxed by the

Court against Culmers in the amount of $85.70.

COUNTERSTATEMENT OF FACTS

Cluffs made two claims which were rejected at trial, one for removal of fish and another for waste. Mention of these claims in Cluffs' Statement of Facts seems inappropriate. The jury found $600.00 damage to the subject premises during the rental time, and awarded judgment against Culmers, not, however, because of breach of the Uniform Real Estate Contract between the parties (R 133). This contract imposes no duty upon Culmers to care for the property occupied by them after the sale and prior to surrender of possession of the property to Cluffs.

Otherwise, Culmers agree with the Statement of Facts made by Cluffs.

ARGUMENT

POINT I

THE COURT RULING OF FEBRUARY 4, 1976, TAXING COSTS SHOULD NOT BE VACATED

If Culmers as the parties against whom costs were claimed were dissatisfied with the costs claimed by Cluffs, they should have filed a motion to have the costs taxed by the Court. URCP 54 (d) (2). This Culmers did (R 47, 48).

The Trial Court thus had Cluffs' itemization of costs before it and the request of Culmer that the Court itself fix or tax the costs, and not accept what was claimed by Cluffs. The spirit of the District Court Rules, Rule 2.8, has been complied with. Cluff claimed costs in his memorandum, and the responsive pleading as required by the Rules is Culmers' motion to have the Court tax the costs. Both sides were thus heard by the Court. One confusing aspect here is that the great bulk of Cluffs' claimed "costs" ($4127.25 out of $4359.65 claimed) are for attorney fees, travel time, copy costs, travel expenses and law clerks' time (R 51, 52, 53, 54). More will be said about this later.

In summary, Culmers assert that

(1) The spirit of Rule 2.8 has been complied with--all parties were heard.

(2) The real dispute is over the award of attorney fees and related charges, which in any event are not costs and should not be awarded, as will be shown later.

POINT II

THE TRIAL COURT CORRECTLY REFUSED TO AWARD ATTORNEY FEES AS COSTS

Under both state and federal practice, attorney fees are not taxable as costs against the losing party. 6 Moore's Federal Practice 54.77 [2] p. 1348. Culmers concur in Cluffs' statement at page 6 of

Appellants' Brief that "Attorney fees are not recoverable by successful litigants either in law or equity except where they are expressly provided for by contract." Moore's Federal Practice adds ". . . nor are they [attorney fees] directly recoverable by a claimant as part of his damages . . . " Id. at 1348. Utah follows this rule. C. G. Horman Company v. Virgil J. Floyd et ux., 28 Utah 2d 112, 499 P 2d 124; Holland v. Brown, 15 Utah 2d 422, 394 P 2d 77; Hawkins v. Perry, 123 Utah 16, 253 P 2d 372.

POINT III

ATTORNEY FEES AND RELATED CHARGES SHOULD NOT BE AWARDED, BECAUSE THE $600.00 AWARDED CLUFFS WAS NOT FOR A BREACH OF CONTRACT, VIOLATION OF UTAH STATUTES, RECOVERY OF THE PREMISES OR PURSUING ANY REMEDY UNDER THE WRITTEN CONTRACT BETWEEN THE PARTIES.

Although the Uniform Real Estate Contract between the parties requires the buyers to care for the property in a stated way (R 133, paragraph 15), there is no contract requirement spelling out care to the property during the time the seller held possession after sale and before surrender of possession to the buyers. Thus, any recovery had by buyers from sellers came from breach of a duty not imposed by the contract. The recovery by Cluffs was not in consequence of contract default by Culmers; therefore, the provision in the contract calling for payment of attorney fees by a defaulting party is not applicable. Hawkins v. Perry, supra.

Nor was the recovery against Culmers based upon violation of statute. Cluffs' complaint alleged that Culmers committed waste, but the Trial Court did not consider the damages as waste, but only as ordinary damages (R 50). There is no finding by the Court or determination by the Jury that Culmers violated the Utah Statute prohibiting waste by a tenant.

In summary, attorney fees should not be allowed, because the $600.00 recovery is grounded neither in Culmers' breach of the contract nor violation of any statute, nor in any other conduct for which attorney fees are allowable by contract.

POINT IV

NO EVIDENCE TO SUPPORT AN AWARD OF ATTORNEY FEES AND RELATED EXPENSES WAS PRESENTED TO THE COURT.

Cluffs claim attorney fees upon itemization in a verified cost bill. Attorney fees are not costs, and a 1973 Utah case holds that an award of attorney fees must be based upon sworn testimony. Aiken et ux. v. Burrows et ux., 30 Utah 2d 116, 514 P 2d 533; see also Butler v. Butler, 23 Utah 2d 259, 461 P 2d 727.

Another earlier Utah case holds that an award of attorney fees may be based upon stipulation that a judge may award an attorney fee based upon his special knowledge as to the value of legal services. However, this is not the case here. There was no such stipulation.

F. M. A. Financial Corporation v. Build, Inc., 17 Utah 2d 80, 404 P 2d 670.

These cases illustrate the general proposition that a judgment must be based upon findings of fact, which in turn must be based upon the evidence. Beneficial Life Insurance Co. v. Mason et al., 108 Utah 437, 160 P 2d 734; Crouch v. Pixler, 83 Ariz. 310, 320 P 2d 943; Mason v. Mason, 108 Utah 428, 160 P 2d 730.

There is one more matter about which something should be said. The amount of attorney fees and related expenses here claimed is very large when compared to the recovery: attorney fees, travel expense, law clerks' time, etc., $4127.25; but only $600.00 recovered. This is nearly seven times more in fees than was recovered. There are cases which hold that even fees which are allowable by contract, if unconscionable so as to become a penalty, may be reduced to less than provided by contract. Wolfe v. Morgan, 11 Wash. App. 738, 524 P 2d 927 (1974).

Here, since there is no sworn testimony, Culmer has had no opportunity to test the credibility of the attorney fee claim by cross-examination.

CONCLUSION

The Trial Court's taxation of costs on February 4, 1976 should be affirmed because:

(1) All parties were adequately heard on the merits as to what costs should be awarded.

(2) Attorney fees, travel expense, law clerk time, etc. could not be awarded, in any case, because the $600.00 recovery was grounded neither in breach of contract nor in violation of statute, nor in other bases wherein attorney fees are allowed.

(3) In any event, attorney fees, travel expense, law clerks' time, etc., can not be awarded, because no sworn testimony was given to support such an award.

(4) The claimed attorney fees are so large when compared to the recovery that a penalty results which should not be imposed upon Culmers.

(5) Remand is inappropriate here, since award of attorney fees and associated fees should not be made in any case.

Respectfully submitted,

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CERTIFICATE OF MAILING

On this 15th day of July, 1976, I mailed a true copy of the foregoing Respondent's Brief, by first-class mail with postage fully prepaid, to Orrin G. Hatch, Esq., attorney for the plaintiffs/appellants herein, 420 Continental Bank Building, Salt Lake City, Utah 84101.

Secretary